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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/728,006	12/03/2003	Rodney Martin Sambrook	S1011/20168 (case 277A)	7204
3000 7590 02/11/2009 CAESAR, RIVISE, BERNSTEIN, COHEN & POKOTILOV, LTD. 11TH FLOOR, SEVEN PENN CENTER 1635 MARKET STREET PHILADELPHIA, PA 19103-2212				
EXAMINER SCHLENTZ, LEAH H				
ART UNIT 1618		PAPER NUMBER		
NOTIFICATION DATE 02/11/2009		DELIVERY MODE ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patents@crbcp.com

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/728,006

Applicant(s)

SAMBROOK ET AL.

Examiner

Leah Schlientz

Art Unit

1618

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 21 January 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Michael G. Hartley/
Supervisory Patent Examiner, Art Unit 1618

Continuation of 11.

Claims 38-42, 44, 45, 53, 54, 59, 60, 62, 63, 72 and 73 are rejected under 35 U.S.C. 103(a) as being unpatentable over Smith (WO 98/15505), in view of Ishii (JP 04327525), for reasons set forth in the previous Office Action.

Claims 38-42, 44, 45, 53, 54, 59, 60, 62-65, 72 and 73 are rejected under 35 U.S.C. 103(a) as being unpatentable over Smith (WO 98/15505), in view of Ishii (JP 04327525), further in view of Itokazu (J. Biomed. Mater. Res., 1998, 39, p. 536 – 538), for reasons set forth in the previous Office Action.

Claims 38-42, 44, 45, 53-55, 59, 60, 62, 63, 72 and 73 are rejected under 35 U.S.C. 103(a) as being unpatentable over Smith (WO 98/15505), in view of Ishii (JP 04327525), further in view of Laurencin (US 5,356,630), for reasons set forth in the previous Office Action.

Claims 38-42, 44, 45, 53, 54, 56, 57, 59, 60, 62, 63, 72 and 73 are rejected under 35 U.S.C. 103(a) as being unpatentable over Smith (WO 98/15505), in view of Ishii (JP 04327525), further in view of Genin (US 6,767,550), for reasons set forth in the previous Office Action.

Applicant argues on pages 2-12 of the Response that the invention of the present application is not obvious over Smith in view of Ishii. Applicant asserts that Smith provides a different method of producing ceramic porous articles having a very broad range of potential porosities while only describing the potential use of the carrier described therein as a drug-filled implant in the most cursory manner. Applicant argues that Ishii provides direct methods of manufacturing are only effective for making carriers of less than 50% porosity (paragraph 0015), while greater porosity and control required for effective drug release carrier can only be provided by indirect method of saturating a polymer foam with ceramic slurry before burning the foam out and sintering the slurry (paragraph 0014). Applicant asserts that Ishii teaches away from producing one having a tubular porosity. Applicant further asserts that Ishii teaches away from the claimed invention by teaching that pore sizes larger than 300 micron cause drug held within the porous article to be released too quickly because the instant claims may have pores up to 800 micron in diameter. Applicant further argues that the porous structure of the instant claims helps to ensure that the pore network is totally interconnected, allowing for far deeper fill than does the reticulated carrier of Ishii. Applicant asserts that this is not remedied by Itokazu.

This is not found to be persuasive. Smith clearly teaches articles having porosity having a theoretical density within the claimed range by controlling sintering, see previous Office Action. His particles are formed by bubbling gas to produce a foam with a large pore structure and high degree of porosity prepared by introducing bubbles of the correct size and quantity into the suspension, causing smaller bubbles to grow by coalescence (page 6, lines 9+), which appears to be the same method by which the carrier of the instant claims are produced. Applicant's arguments regarding Ishii's teaching away from the claimed porosity and pore size have been fully considered. However, it is deemed that the Ishii reference does not reach the level of a teaching away, as suggested by Applicant. A prior art reference that "teaches away" from the claimed invention is a significant factor to be considered in determining obviousness; however, "the nature of the teaching is highly relevant and must be weighed in substance. A known or obvious composition does not become patentable simply because it has been described as somewhat inferior to some other product for the same use." In re Gurley, 27 F.3d 551, 554, 31 USPQ2d 1130, 1132 (Fed. Cir. 1994). Furthermore, "the prior art's mere disclosure of more than one alternative does not constitute a teaching away from any of these alternatives because such disclosure does not criticize, discredit, or otherwise discourage the solution claimed...." In re Fulton, 391 F.3d 1195, 1201, 73 USPQ2d 1141, 1146 (Fed. Cir. 2004). See MPEP 2145. The Ishii reference merely teaches that a variety of well-known methods can be taken for the manufacture of a ceramic porous body, and thus it is considered that since Smith is well capable of making porous bodies having the claimed porosity, such a method would be suitable. Regarding Applicant's assertion that Ishii teaches away from pores such as 800 micron, it is noted that the claims are not limited to such a pore size. The claims include pores as small as 20 micron, which are well within the teaching of Ishii or Smith. Regarding Applicant's assertion that the instant pore structure is interconnected, this is not found to be persuasive. Smith's methods of particle production appear to be the same as the method of the producing a carrier in the instant application, as set forth above. Itokazu was relied upon for teaching MTX as a suitable anticancer drug, not for pore structure.